

OFFER AND AWARD



ARIZONA DEPARTMENT OF EDUCATION
Procurement Section
1535 West Jefferson Street, Bin #37
Phoenix, Arizona 85007

SOLICITATION NO. ED04-0080

OFFER

The Undersigned hereby offers and agrees to furnish the materials, service(s) or construction in compliance with all the terms, conditions, specifications and amendments in the solicitation.

POD, Inc.
Company Name
5971 Jefferson NE Suite 101
Street Address
Albuquerque, NM 87109
City State Zip Code
Telephone Number: 505/243-2287

Samantha L. Lapin
Name of Person Authorized to Sign Offer
President/CEO
Title of Authorized Person

Samantha Lapin 6/2/04
Signature of Authorized Person Date of Offer

Facsimile Number: 505/243-4677

Offeror's Arizona Transaction (Sales) Privilege Tax License Number: 07-656363-J

Offeror's Federal Employer Identification Number: 85-0367128

Acknowledgement of Amendment(s):
(Offeror acknowledges receipt of amendment(s) to the Solicitation for Offers and related documents numbered and dated

Amendment No. Date

Amendment No. Date

ACCEPTANCE OF OFFER AND CONTRACT AWARD

(For State of Arizona Use Only)

Your Offer, dated 6/3/2004, is hereby accepted as described in the Notice of Award. You are now bound to perform based upon the solicitation and your Offer, as accepted by the State.

This Contract shall henceforth be referred to as Contract Number ED04-0080-01.

You are hereby cautioned not to commence any billable work or provide any material, service or construction under this contract until you receive an executed purchase order, contract release document, or written notice to proceed, if applicable.

State of Arizona

Awarded this 29th day of June 2004
Douglas C. Peebles
Douglas C. Peebles, CPPB, CPCU
Procurement Officer

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SECTION 1 SCOPE OF WORK

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1. PURPOSE: The Arizona Department of Education (ADE) is seeking to update an administrative computer application that is outmoded and not capable of being modified to meet new needs of the Department. ADE's Certification Unit has new requirements in the area of certifying teachers, tracking teacher certification status, and online handling of the application and fee collection process. The Certification Unit will rely strongly on the new application for performing its mission effectively.

1.1. The new application must resolve areas of dissatisfaction with the existing application, including:

1.1.1 Difficulty in navigation within the application.

1.1.2 Lack of automated validation of requirements in the issuance of teaching certificates.

1.1.3 The need to enter duplicate data as the certification progresses through the normal workflow.

1.2 The new application must add new web functionality to enable:

1.2.1 Renewal of existing teaching certificates online.

1.2.2 Application for new teaching certificates online.

1.2.4 Online payment of fees.

1.2.5 Monitoring the status of existing certification online.

1.3 Time is critical; the new application must meet the following time schedule:

1.3.1 Beta release by 9/1/2004 (best efforts) – 9/30/2004 latest.

1.3.2 Production release by 11/1/2004 (best efforts) – 11/30/2004 latest.

2. BACKGROUND: Over the past several years ADE attempted to develop an administrative computer application to meet the needs of the Department's Certification Unit. Over the past six months ADE realized that this application cannot meet ADE's needs. The system must not only satisfy ADE's internal needs, it also must satisfy federal requirements found in No Child is Left Behind legislation as well as IDEA legislation. ADE consulted with outside experts to determine a viable action plan to meet these needs. These experts included Microsoft Consulting services and Gray Hawk Technologies, who worked with ADE to assist in defining a viable plan of action.

2.1 ADE desires a custom built application. Such an application will enable ADE to maintain and modify the application in the future, as our business needs change. It will also insure that the application integrates seamlessly into the ADE information technology infrastructure, and permit ADE to maintain a uniform outward appearance to external customers who use this application and may use our other applications like the Student Information Accountability System (SAIS). It will also permit ADE to integrate this application seamlessly into our planned data warehouse.

2.2 Microsoft's consulting resulted in a Scope and Vision document that define an approach that will not only satisfy ADE's external and internal needs, but also result in a well-integrated solution within ADE's information technology infrastructure. A copy of this document is attached at Exhibit 7.2. This is a public document, and may be used by anyone who desires to submit a proposal in response to this solicitation.

2.3 Gray Hawk's consulting resulted in a Functional Specification document that is based on the above approach. A copy of this document is attached as Exhibit 7.3, and it too may be used by anyone who desires to submit a proposal in response to this solicitation.

2.4 All interested parties that are capable of satisfying the requirements stated herein are encouraged to submit a proposal in response to this solicitation.

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3. Requirements

- 3.1 A successful response to this RFP will propose an application that will function seamlessly within ADE's existing information technology architecture, by means of an intuitive and user-friendly graphic user interface (GUI). It will enable internal users to perform their jobs effectively, permit teachers in remote locations to apply for new or renewal certificates, and capture information to be used both for tracking of certification status and for statistical analysis and reporting purposes.
- 3.2 Security and hierarchy of access. The new application must employ sufficient security measures as to prevent access to information to any but those entitled to such access. The level of access to information will be different for various users. Officials of ADE's Certification Unit will have access to the broad database. School districts and charter holders will be limited to data associated with all the schools in their purview. Individual schools will have access only to data associated with that school. Applicants will see no data other than their own.
- 3.3 Validation. Insofar as possible, the new application must ensure that data is entered once only, and prevent errors that arise from duplicate sets of data. It must employ error checking procedures and validation techniques so as to enforce business rules, prevent users from performing actions in violation of certification requirements or policy, and prevent the performance of services when payment has not been made.
- 3.4 Evaluation and screening. Screeners and evaluators need a summary view of information about an educator, one that incorporates search capability. Also needed is an evaluations area to allow them to conduct an evaluation of the applicant, including the ability to view a summary of all certifications requested for an applicant in a summary area.
- 3.5 Reporting. A number of reports are required for users. They include: operator report, NSF report, certificate reports (filterable), aged pending services (started and completed) report, fees reports, fingerprint report, state employee exception report, Arizona revocations report, and ad hoc reports.
- 3.6 Investigations. Investigators must be able to lock files (and unlock them, when appropriate), input disciplinary information, and prevent issuance of certificates. Investigators need an investigations comment page, and every application should have an indicator to plainly show whether it is under investigation.
- 3.7 Online applications. External Users must be able to make credit card payment with application. The new system must ensure all mandatory fields are populated before an application submission. Users must be able to select the service(s) for which they are applying. The new system must calculate, and present to the user, the total amount due during the online purchase transaction, and trigger the issuance of a receipt via E-mail.
- 3.8 Other. The new Certification application must allow for querying. It must be able to track teachers holding emergency certificates. It should identify teachers holding emergency certifications who move (whether from district to district or within the same district) on different emergency certifications, without committing to completing the necessary coursework for permanent certification.

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3.9 Estimated Size.

- 3.9.1 Present database has over 200,000 valid certificates
- 3.9.2 Retention of valid certificates is 7 years
- 3.9.3 We do not expect the database to double in 7 years
- 3.9.4 Annual processing is over 60,000 certification services
- 3.9.5 A "service" is creating new or revised applications, in resulting in certification

- 3.10 Acceptance. Satisfactory completion will be assessed by delivery of an operational Certification application (Beta) by 9/1/04 (best efforts) – 9/30/2004 latest, and by its success in meeting specified business requirements, user requirements, and operational requirements. Performance of the new application must meet or surpass performance of the existing application. Teacher data must be migrated to the database. ADE users must be able to actively use the application to perform their jobs. Applicants must be able to submit online applications, including using credit/debit cards. The application must be documented adequately; to include both technical and requirements documentation, and training materials for the system must be developed and tested.

SECTION 2

SPECIAL TERMS AND CONDITIONS

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1. **Definition of Terms Used in these Special Terms and Conditions.** As used in these Special Terms and Conditions, the following terms, in addition to those terms defined in Section 3, Paragraph 1, have the following meaning:
 - A. “ADE” means the Arizona Department of Education.
 - B. “Contract Price” means the total amount of the Contract for the price payable for the estimated quantities.
 - C. “Department” means the Arizona Department of Education.
 - D. “Services” means services performed, workmanship and material furnished or used in the performance of services.

2. **Changes.**
 - A. The Procurement Officer may at any time, by written order, and without notice to the sureties, if any, make mutually acceptable changes within the general scope of this Contract in any one or more of the following:
 - (1) Description of services to be performed;
 - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
 - (3) Place of performance of the services;
 - (4) Drawings, designs, or specifications when the supplies to be furnished are to be specifically manufactured for the State in accordance with the drawings, designs, or specifications;
 - (5) Method of shipment or packing; or
 - (6) Place of delivery.
 - B. If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, the Procurement Officer shall make an equitable adjustment in the Contract price, the delivery schedule, or both based on the Contractor’s proposal and the Procurement Officer’s determination.
 - C. The Contractor must assert its right to an adjustment under this provision within 30 days from the date of receipt of the written order. However, if the Procurement Officer decides that the facts justify it, the Procurement Officer may receive and act upon a proposal submitted before final payment of the Contract.
 - D. If the Contractor’s proposal includes the cost of property made obsolete or excess by the change, the Procurement Officer shall have the right to prescribe the manner of the disposition of the property.
 - E. Failure to agree to any adjustment shall be a dispute under the Contract Claims provision of this Contract. However, nothing in this provision shall excuse the Contractor from proceeding with the Contract as changed.

3. **Indemnification.**

Contractor shall indemnify, defend, save and hold harmless the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees (hereinafter referred to as “Indemnitee”) from and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys’ fees, and costs of claim processing, investigation and litigation) (hereinafter referred to as “Claims”) for bodily injury or personal injury (including death), or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Contractor or any of its owners, officers, directors, agents, employees or subcontractors. This indemnity includes any claim or amount arising out of or recovered under the Workers’ Compensation Law or arising out of the failure of such contractor to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the parties

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that the Indemnatee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the Indemnatee, be indemnified by Contractor from and against any and all claims. It is agreed that Contractor will be responsible for primary loss investigation, defense and judgment costs where this indemnification is applicable. In consideration of the award of this contract, the Contractor agrees to waive all rights of subrogation against the State of Arizona, its officers, officials, agents and employees for losses arising from the work performed by the Contractor for the State of Arizona.

This indemnity shall not apply if the contractor or sub-contractor(s) is/are an agency, board, commission or university of the State of Arizona.

4. Insurance.

Contractor and subcontractors shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract, are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors.

The *insurance requirements* herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract. The State of Arizona in no way warrants that the minimum limits contained herein are sufficient to protect the Contractor from liabilities that might arise out of the performance of the work under this contract by the Contractor, its agents, representatives, employees or subcontractors, and Contractor is free to purchase additional insurance.

A. **MINIMUM SCOPE AND LIMITS OF INSURANCE:** Contractor shall provide coverage with limits of liability not less than those stated below.

1. Commercial General Liability – Occurrence Form

Policy shall include bodily injury, property damage, personal injury and broad form contractual liability.

- General Aggregate \$2,000,000
- Products – Completed Operations Aggregate \$1,000,000
- Personal and Advertising Injury \$1,000,000
- Blanket Contractual Liability – Written and Oral \$1,000,000
- Fire Legal Liability \$ 50,000
- Each Occurrence \$1,000,000

a. The policy shall be endorsed to include the following additional insured language: ***“The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Contractor”.***

b. Policy shall contain a waiver of subrogation against the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Contractor.

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2. **Worker's Compensation and Employers' Liability**

Workers' Compensation	Statutory
Employers' Liability	
Each Accident	\$ 500,000
Disease – Each Employee	\$ 500,000
Disease – Policy Limit	\$1,000,000

- a. Policy shall contain a waiver of subrogation against the State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Contractor.
- b. This requirement shall not apply to: Separately, EACH contractor or subcontractor exempt under A.R.S. § 23-901, AND when such contractor or subcontractor executes the appropriate waiver (Sole Proprietor/Independent Contractor) form.

B. **ADDITIONAL INSURANCE REQUIREMENTS:** The policies shall include, or be endorsed to include, the following provisions:

1. The State of Arizona, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees wherever additional insured status is required such additional insured shall be covered to the full limits of liability purchased by the Contractor, even if those limits of liability are in excess of those required by this Contract.
2. The Contractor's insurance coverage shall be primary insurance with respect to all other available sources.
3. Coverage provided by the Contractor shall not be limited to the liability assumed under the indemnification provisions of this Contract.

C. **NOTICE OF CANCELLATION:** Each insurance policy required by the insurance provisions of this Contract shall provide the required coverage and shall not be suspended, voided, canceled, or reduced in coverage or in limits except after thirty (30) days prior written notice has been given to the State of Arizona. Such notice shall be sent directly to the person named in paragraph 23 of this section and shall be sent by certified mail, return receipt requested.

D. **ACCEPTABILITY OF INSURERS:** Insurance is to be placed with duly licensed or approved non-admitted insurers in the state of Arizona with an "A.M. Best" rating of not less than A- VII. The State of Arizona in no way warrants that the above-required minimum insurer rating is sufficient to protect the Contractor from potential insurer insolvency.

E. **VERIFICATION OF COVERAGE:** Contractor shall furnish the State of Arizona with certificates of insurance (ACORD form or equivalent approved by the State of Arizona) as required by this Contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

All certificates and endorsements are to be received and approved by the State of Arizona before work commences. Each insurance policy required by this Contract must be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of the project. Failure to maintain the insurance policies as required by this Contract, or to provide evidence of renewal, is a material

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breach of contract.

All certificates required by this Contract shall be sent directly to the person named in paragraph 23 of this section. The State of Arizona project/contract number and project description shall be noted on the certificate of insurance. The State of Arizona reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time. **DO NOT SEND CERTIFICATES OF INSURANCE TO THE STATE OF ARIZONA'S RISK MANAGEMENT SECTION.**

- F. **SUBCONTRACTORS:** Contractors' certificate(s) shall include all subcontractors as insureds under its policies or Contractor shall furnish to the State of Arizona separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to the minimum requirements identified above.
- G. **APPROVAL:** Any modification or variation from the *insurance requirements* in this Contract shall be made by the Department of Administration, Risk Management Section, whose decision shall be final. Such action will not require a formal Contract amendment, but may be made by administrative action.
- H. **EXCEPTIONS:** In the event the Contractor or sub-contractor(s) is/are a public entity, then the Insurance Requirements shall not apply. Such public entity shall provide a Certificate of Self-Insurance. If the contractor or sub-contractor(s) is/are a State of Arizona agency, board, commission, or university, none of the above shall apply.

5. **Contract Term.** The term of this Contract shall commence on the date the Procurement Officer signs the Offer and Acceptance Form, signifying ADE's acceptance of the Offeror/Contractor's proposal and will remain in effect through November 30, 2004, unless terminated, canceled, or extended as otherwise provided herein.
6. **Pricing.** All pricing shall be firm, fixed and be inclusive of all labor, equipment, materials, products, freight (FOB Destination), consumable supplies, insurance, and all other costs incidental to the services provided.
7. **Contractor's Obligation Regarding Confidentiality.** Due to the sensitive nature of the information maintained by ADE, the Contractor acknowledges that all information disclosed to it concerning ADE's operations during performance of this Contract shall not be disclosed to third parties without the ADE's prior written consent. Any and all proprietary information and all copies thereof shall be returned to ADE upon completion of the work for which it was obtained or developed.
8. **Key Contractor Personnel.** It is essential that the Contractor provide an adequate staff of experienced personnel, capable of and devoted to the successful accomplishment of work to be performed under this Contract. The Contractor must assign specific individuals to key positions. Once assigned to work under this Contract, key personnel shall not be removed or replaced without the prior written approval of the Procurement Officer. Submission of VITA for contractor staff proposed to be responsible for the major tasks (e.g. scaling and equating) is required.
9. **Removal of Contractor Personnel.** The Contractor agrees to utilize only experienced, responsible and capable employees in the performance of the work. ADE may require that the Contractor remove from the job, by this Contract, employees who endanger person or property or whose continued employment under this Contract is, in the opinion of ADE, not justified due to unacceptable performance of duties, or is inconsistent with the interests of ADE.
10. **Warranty of Services.** The Contractor warrants that all services provided hereunder will conform to the requirements of the Contract, including all descriptions, specifications and attachments made a part of this Contract. ADE's acceptance of services or goods provided by the Contractor shall not relieve the Contractor from its obligations under this warranty. In addition to its other remedies, ADE may, at the Contractor's expense, require prompt

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correction of any services failing to meet the Contractor's warranty herein. Services corrected by the Contractor shall be subject to all the provisions of this Contract in the manner and to the same extent as services originally furnished hereunder.

11. **Ownership.** All deliverables and/or other products of this Contract (including, but not limited to, all software documentation, reports, records, summaries and other matter and materials prepared or developed by the Contractor in performance of this Contract) shall be the sole, absolute and exclusive property of ADE, free from any claim or retention of rights thereto on the part of the Contractor, its agents, subcontractors, officers, or employees, with the exception of third party proprietary software packages which may be procured under this or separate agreement.
12. **Working Arrangements.** ADE agrees to provide working space, computer machine time and materials, which may reasonably be required to perform services, described herein. However, ADE may choose to utilize Contractor-provided facilities, equipment, software, etc.
13. **Acceptance of Services.** ADE will make determination of the acceptability of work. Work shall be completed in a responsible and professional manner and in accordance with the Statement of Work, schedules, test plans, or performance/operating standards specified within the Statement of Work.
14. **Cooperation with Other Contractors and Subcontractors.** The Contractor shall fully cooperate with other ADE contractors, subcontractors and assigns and shall carefully plan and perform its own work to accommodate the work of other ADE contractors. The Contractor shall not intentionally commit or permit any act, which will interfere with the performance of work by any other ADE contractors.
15. **Non-exclusive Status.** ADE reserves the right, if necessary, to have the same or similar services provided by other than the Contractor.
16. **Report Standards.** Reports or written materials prepared by the Contractor in response to the requirements of this Contract shall be thoroughly researched for accuracy of content, shall be grammatically correct and not contain spelling errors, shall be submitted in a format approved in advance by the Procurement Officer, and shall be submitted in draft form for advance review and comment by the Procurement Officer, if necessary or specified. The cost of correcting grammatical errors, correcting report data, or other revisions required to bring the report or written material into compliance with the Contract requirements shall be borne by the Contractor.
17. **Liquidated Damages.**
 - A. If the Contractor fails to deliver an operational Certification Application (Beta) version of this application by 9/30/2004 and production release by 11/30/2004 as specified in this contract (Scope of Work, paragraph 3.11), or any extension, the Contractor shall, in place of actual damages, pay to ADE as fixed, agreed, and liquidated damages, for each calendar day of delay, the sum of \$1,000.
 - B. Alternatively, if delivery or performance is so delayed, ADE may terminate this Contract in whole or in part under the Termination for Default Provision of this Contract and in that event, the Contractor shall be liable for fixed, agreed, and liquidated damages accruing until the time the State may reasonably obtain delivery or performance of similar supplies or services. The liquidated damages shall be in addition to excess costs under the Termination for Default provision of this Contract.
 - C. The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Termination for Default provision of this Contract.
18. **Performance Surety.**

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- A. The Contractor will be required to furnish surety to guarantee faithful performance of the Contract in the amount of 100 percent (%) of the total Contract amount. The performance surety shall be provided the Procurement Officer within ten (10) days after Contractor's receipt of the Procurement Officer's request for it. The performance surety shall be delivered to:

Arizona Department of Education
Contracts Management Unit, Bin #50
Attn: Valarie Dowers
1535 West Jefferson Street
Phoenix, Arizona 85007

- B. Acceptable performance sureties are limited to:
- (1) A one-time performance bond underwritten by a company licensed to issue performance bonds in the State of Arizona; or
 - (2) A certified check or cashier's check.
- C. Failure to accomplish timely delivery of said bond or other such surety as approved by the Procurement Officer shall constitute a material breach of this Contract and may, at ADE's sole option, result in termination of the Contract in accordance with the Termination for Default provision of this Contract.
- D. The Procurement Officer will return the performance surety to the Contractor as soon as practicable upon completion of the Contract.

19. Payments.

- A. The Contractor shall submit invoices in one (1) original and one (1) copy. Invoices shall include:
- (1) Name and address of the Contractor.
 - (2) Invoice date.
 - (3) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).
 - (4) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.
 - (5) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms).
 - (6) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the Contract or in a proper notice of assignment).
 - (7) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.
 - (8) Any other information or documentation required by the Contract (such as evidence of shipment).
- B. Submittal of an invoice constitutes Contractor's certification that services have been delivered as specified on the invoice in accordance with the Contract.

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- C. Submit invoices to the following address:

Arizona Department of Education
Accounting, Bin #1
1535 West Jefferson Street
Phoenix, Arizona 85007

20. Address to which Contractor payment(s) should be mailed, if different than that listed on the Offer and Award Form.

(Company Name)

(Street Address)

(City & State) (Zip Code)

21. Contractor representative to contact for contract administration purposes:

Barbara Clark, Vice President, Finance and Administration
5971 Jefferson NE, Suite 101
Albuquerque, NM 87109
(505) 243-2287 (Telephone) (505) 243-4677 (Facsimile)
Barb@PODassoc.com (E-Mail)

22. The ADE representative to contact for technical matters concerning contract performance (NOTE: this person is not authorized to direct contractor performance or make changes in contract requirements.)

Hayford Gyampoh
Deputy Associate Superintendent, MIS
1535 West Jefferson Street Bin #17
Phoenix, Arizona 85007
Phone: (602) 542-7886
FAX: (602) 542-2560
E-Mail: hgyampoh@ade.az.gov

23. All contract administration matters will be managed by the Procurement Officer named below. All correspondence concerning this contract shall be directed to this individual.

Douglas C. Peeples, CPPB, CPCPM
Chief Procurement Officer
Contracts Management Unit, Bin #37
1535 West Jefferson Street
Phoenix, Arizona 85007
Phone: (602) 542-4352
FAX: (602) 542-3359
E-Mail: dpeeples@ade.az.gov

SECTION 3 UNIFORM TERMS AND CONDITIONS

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Ver. 7

1. Definition of Terms. As used in this Solicitation and any resulting Contract, the terms listed below are defined as follows:

- A. *"Attachment"* means any item the Solicitation requires the Offeror to submit as part of the Offer.
- B. *"Contract"* means the combination of the Solicitation, including the Uniform and Special Instructions to Offerors, the Uniform and Special Terms and Conditions, and the Specifications and Statement of Scope of Work; the Offer and any Best and Final Offers; and any Solicitation Amendments or Contract Amendments.
- C. *"Contract Amendment"* means a written document signed by the Procurement Officer that is issued for the purpose of making changes in the Contract.
- D. *"Contractor"* means any person who has a Contract with the State.
- E. *"Days"* means calendar days unless otherwise specified
- F. *"Exhibit"* means any item labeled as an Exhibit in the Solicitation or placed in the Exhibits section of the Solicitation.
- G. *"Gratuity"* means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
- H. *"Materials"* means all property, including equipment, supplies, printing, insurance and leases of property but does not include land, a permanent interest in land or real property or leasing space.
- I. *"Procurement Officer"* means the person duly authorized by the State to enter into and administer Contracts and make written determinations with respect to the Contract or their designee.
- J. *"Services"* means the furnishing of labor, time or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance, but does not include employment agreements or collective bargaining agreements.
- K. *"Subcontract"* means any Contract, express or implied, between the Contractor and another party or between a subcontractor and another party delegating or assigning, in whole or in part, the making or furnishing of any material or any service required for the performance of the Contract.
- L. *"State"* means the State of Arizona and Department or Agency of the State that executes the Contract.
- M. *"State Fiscal Year"* means the period beginning with July 1 and ending June 30.

2. Contract Interpretation.

- A. Arizona Law. The Arizona law applies to this Contract including, where applicable, the Uniform Commercial Code as adopted by the State of Arizona and the Arizona Procurement Code, Arizona Revised Statutes (A.R.S.) Title 41, Chapter 23, and its implementing rules, Arizona Administrative Code (A.A.C.) Title 2, Chapter 7.
- B. Implied Contract Terms. Each provision of law and any terms required by law to be in this Contract are a part of this Contract as if fully stated in it.

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- C. Contract Order of Precedence. In the event of a conflict in the provisions of the Contract, as accepted by the State and as they may be amended, the following shall prevail in the order set forth below:
- (1) Special Terms and Conditions;
 - (2) Uniform Terms and Conditions;
 - (3) Statement or Scope of Work;
 - (4) Specifications;
 - (5) Attachments;
 - (6) Exhibits;
 - (7) Documents referenced or included in the Solicitation.
- D. Relationship of Parties. The Contractor under this Contract is an independent Contractor. Neither party to this Contract shall be deemed to be the employee or agent of the other party to the Contract.
- E. Severability. The provisions of this Contract are severable. Any term or condition deemed illegal or invalid shall not affect any other term or condition of the Contract.
- F. No Parol Evidence. This Contract is intended by the parties as a final and complete expression of their agreement. No course of prior dealings between the parties and no usage of the trade shall supplement or explain any terms used in this document and no other understanding either oral or in writing shall be binding.
- G. No Waiver. Either party's failure to insist on strict performance of any term or condition of the Contract shall not be deemed a waiver of that term or condition even if the party accepting or acquiescing in the nonconforming performance knows of the nature of the performance and fails to object to it.

3. Contract Administration and Operation.

- A. Records. Under A.R.S. § 35-214 and § 35-215, the Contractor shall retain and shall contractually require each subcontractor to retain all data and other "records" relating to the acquisition and performance of the Contract for a period of five years after the completion of the Contract. All records shall be subject to inspection and audit by the State at reasonable times. Upon request, the Contractor shall produce a legible copy of any or all such records.
- B. Non-Discrimination. The Contractor shall comply with State Executive Order No. 99-4 and all other applicable Federal and State laws, rules and regulations, including the Americans with Disabilities Act.
- C. Audit. Pursuant to A.R.S. § 35-214, at any time during the term of this Contract and five (5) years thereafter, the Contractor's or any subcontractor's books and records shall be subject to audit by the State and, where applicable, the Federal Government, to the extent that the books and records relate to the performance of the Contract or Subcontract.
- D. Facilities Inspection and Materials Testing. The Contractor agrees to permit access to its facilities, subcontractor facilities and the Contractor's processes or services, at reasonable times for inspection of the facilities or materials covered under this Contract. The State shall also have the right to test, at its own cost,

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the materials to be supplied under this Contract. Neither inspection of the Contractor's facilities nor materials testing shall constitute final acceptance of the materials or services. If the State determines non-compliance of the materials, the Contractor shall be responsible for the payment of all costs incurred by the State for testing and inspection.

- E. Notices. Notices to the Contractor required by this Contract shall be made by the State to the person indicated on the Offer and Acceptance form submitted by the Contractor unless otherwise stated in the Contract. Notices to the State required by the Contract shall be made by the Contractor to the Solicitation Contact Person indicated on the Solicitation cover sheet, unless otherwise stated in the Contract. An authorized Procurement Officer and an authorized Contractor representative may change their respective person to whom notice shall be given by written notice and an amendment to the Contract shall not be necessary.
- F. Advertising, Publishing and Promotion of Contract. The Contractor shall not use, advertise or promote information for commercial benefit concerning this Contract without the prior written approval of the Procurement Officer.
- G. Property of the State. Any materials, including reports, computer programs and other deliverables, created under this Contract are the sole property of the State. The Contractor is not entitled to a patent or copyright on those materials and may not transfer the patent or copyright to anyone else. The Contractor shall not use or release these materials without the prior written consent of the State.
- H. Ownership of Intellectual Property. Any and all intellectual property, including but not limited to copyright, invention, trademark trade name, service mark, and/or trade secrets created or conceived pursuant to or as a result of this Contract and any related subcontract ("Intellectual Property"), shall be work made for hire and the State shall be considered the creator of such Intellectual Property. The agency, department, division, board or commission of the State of Arizona requesting the issuance of this Contract shall own (for and on behalf of the State) the entire right, title and interest to the Intellectual Property throughout the world. Contractor shall notify the State, within thirty (30) days, of the creation of any Intellectual Property by it or its subcontractor(s). Contractor, on behalf of itself and any subcontractor(s), agrees to execute any and all document(s) necessary to assure ownership of the Intellectual Property vests in the State and shall take no affirmative actions that might have the effect of vesting all or part of the Intellectual Property in any entity other than the State. The Intellectual Property shall not be disclosed by Contractor or its subcontractor(s) to any entity not the State without the express written authorization of the agency, department, division, board or commission of the State of Arizona requesting the issuance of this Contract.

4 **Costs and Payments.**

- A. Payments. Payments shall comply with the requirements of A.R.S. Titles 35 and 41, Net 30 days. Upon receipt and acceptance of goods or services, the Contractor shall submit a complete and accurate invoice for payment from the State within thirty (30) days.
- B. Delivery. Unless stated otherwise in the Contract, all prices shall be F.O.B. Destination and shall include all freight delivery and unloading at the destinations.
- C. Applicable Taxes.
 - (1) Payment of Taxes. The Contractor shall be responsible for paying all applicable taxes.
 - (2) State and Local Transaction Privilege Taxes. The State of Arizona is subject to all applicable state

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and local transaction privilege taxes. Transaction privilege taxes apply to the sale and are the responsibility of the seller to remit. Failure to collect taxes from the buyer does not relieve the seller from its obligation to remit taxes.

- (3) Tax Indemnification. Contractor and all subcontractors shall pay all Federal, state and local taxes applicable to its operation and any persons employed by the Contractor. Contractor shall, and require all subcontractors to hold the State harmless from any responsibility for taxes, damages and interest, if applicable, contributions required under Federal, and/or state and local laws and regulations and any other costs including transaction privilege taxes, unemployment compensation insurance, Social Security and Worker's Compensation.
- (4) IRS W9 Form. In order to receive payment, the Contractor shall have a current I.R.S. W9 Form on file with the State of Arizona, unless not required by law.
- (5) Availability of Funds for the Next State Fiscal Year. Funds may not presently be available for performance under this Contract beyond the current state fiscal year. No legal liability on the part of the State for any payment may arise under this Contract beyond the current state fiscal year until funds are made available for performance of this Contract.
- (6) Availability of Funds for the Current State Fiscal Year. Should the State Legislature enter back into session and reduce the appropriations or for any reason and these goods or services are not funded, the State may take any of the following actions:
 - a. Accept a decrease in price offered by the Contactor;
 - b. Cancel the Contract;
 - c. Cancel the Contract and re-solicit the requirements.

5 Contract Changes.

- A. Amendments. This Contract is issued under the authority of the Procurement Officer who signed this Contract. The Contract may be modified only through a Contract Amendment within the scope of the Contract. Changes to the Contract, including the addition of work or materials, the revision of payment terms, or the substitution of work or materials, directed by a person who is not specifically authorized by the Procurement Officer in writing or made unilaterally by the Contractor are violations of the Contract and of applicable law. Such changes, including unauthorized written Contract Amendments shall be void and without effect, and the Contractor shall not be entitled to any claim under this Contract based on those changes.
- B. Subcontracts. The Contractor shall not enter into any Subcontract under this Contract for the performance of this Contract without the advance written approval of the Procurement Officer. The Contractor shall clearly list any proposed subcontractors and the subcontractor's proposed responsibilities. The Subcontract shall incorporate by reference the terms and conditions of this Contract.
- C. Assignment and Delegation. The Contractor shall not assign any right nor delegate any duty under this Contract without the prior written approval of the Procurement Officer. The State shall not unreasonably withhold approval.

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6. Risk and Liability.

- A. Risk of Loss. The Contractor shall bear all loss of conforming material covered under this Contract until received by authorized personnel at the location designated in the purchase order or Contract. Mere receipt does not constitute final acceptance. The risk of loss for nonconforming materials shall remain with the Contractor regardless of receipt.
- B. General Indemnification. To the extent permitted by A.R.S. § 41-621 and § 35-154, the State of Arizona shall be indemnified and held harmless by the Contractor for its vicarious liability as a result of entering into this Contract. Each party to this Contract is responsible for its own negligence.
- C. Indemnification.
- (1) Contractor/Vendor Indemnification (Not Public Agency). The parties to this Contract agree that the State of Arizona, its departments, agencies, boards and commissions shall be indemnified and held harmless by the Contractor for the vicarious liability of the State as a result of entering into this Contract. However, the parties further agree that the State of Arizona, its departments, agencies, boards and commissions shall be responsible for its own negligence. Each party to this Contract is responsible for its own negligence.
 - (2) Public Agency Language Only. Each party (as 'indemnitor') agrees to indemnify, defend, and hold harmless the other party (as 'indemnitee') from and against any and all claims, losses, liability, costs, or expenses (including reasonable attorney's fees) (hereinafter collectively referred to as 'claims') arising out of bodily injury of any person (including death) or property damage but only to the extent that such claims which result in vicarious/derivative liability to the indemnitee, are caused by the act, omission, negligence, misconduct, or other fault of the indemnitor, its officers, officials, agents, employees, or volunteers.
 - (3) Indemnification – Patent and Copyright. The Contractor shall indemnify and hold harmless the State against any liability, including costs and expenses, for infringement of any patent, trademark or copyright arising out of Contract performance or use by the State of materials furnished or work performed under this Contract. The State shall reasonably notify the Contractor of any claim for which it may be liable under this paragraph. If the Contractor is insured pursuant to A.R.S. § 41-621 and § 35-154, this section shall not apply.
- D. Force Majeure.
- (1) Except for payment of sums due, neither party shall be liable to the other nor deemed in default under this Contract if and to the extent that such party's performance of this Contract is prevented by reason of force majeure. The term "*force majeure*" means an occurrence that is beyond the control of the party affected and occurs without its fault or negligence. Without limiting the foregoing, force majeure includes acts of God; acts of the public enemy; war; riots; strikes; mobilization; labor disputes; civil disorders; fire; flood; lockouts; injunctions-intervention-acts; or failures or refusals to act by government authority; and other similar occurrences beyond the control of the party declaring force majeure which such party is unable to prevent by exercising reasonable diligence.
 - (2) Force Majeure shall not include the following occurrences:
 - a. Late delivery of equipment or materials caused by congestion at a manufacturer's plant or

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elsewhere, or an oversold condition of the market;

- b. Late performance by a subcontractor unless the delay arises out of a force majeure occurrence in accordance with this force majeure term and condition; or
 - c. Inability of either the Contractor or any subcontractor to acquire or maintain any required insurance, bonds, licenses or permits.
- (3) If either party is delayed at any time in the progress of the work by force majeure, the delayed party shall notify the other party in writing of such delay, as soon as is practicable and no later than the following working day, of the commencement thereof and shall specify the causes of such delay in such notice. Such notice shall be delivered or mailed certified-return receipt and shall make a specific reference to this article, thereby invoking its provisions. The delayed party shall cause such delay to cease as soon as practicable and shall notify the other party in writing when it has done so. The time of completion shall be extended by Contract Amendment for a period of time equal to the time that results or effects of such delay prevent the delayed party from performing in accordance with this Contract.
- (4) Any delay or failure in performance by either party hereto shall not constitute default hereunder or give rise to any claim for damages or loss of anticipated profits if, and to the extent that such delay or failure is caused by force majeure.
- E. Third Party Antitrust Violations. The Contractor assigns to the State any claim for overcharges resulting from antitrust violations to the extent that those violations concern materials or services supplied by third parties to the Contractor, toward fulfillment of this Contract.

7. Warranties.

- A. Liens. The Contractor warrants that the materials supplied under this Contract are free of liens and shall remain free of liens.
- B. Quality. Unless otherwise modified elsewhere in these terms and conditions, the Contractor warrants that, for one year after acceptance by the State of the materials, they shall be:
 - (1) Of a quality to pass without objection in the trade under the Contract description;
 - (2) Fit for the intended purposes for which the materials are used;
 - (3) Within the variations permitted by the Contract and are of even kind, quantity, and quality within each unit and among all units;
 - (4) Adequately contained, packaged and marked as the Contract may require; and
 - (5) Conform to the written promises or affirmations of fact made by the Contractor.
- C. Fitness. The Contractor warrants that any material supplied to the State shall fully conform to all requirements of the Contract and all representations of the Contractor, and shall be fit for all purposes and uses required by the Contract.
- D. Inspection/Testing. The warranties set forth in subparagraphs 7A through 7C of this paragraph are not affected

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by inspection or testing of or payment for the materials by the State.

E. Year 2000.

- (1) Notwithstanding any other warranty or disclaimer of warranty in this Contract, the Contractor warrants that all products delivered and all services rendered under this Contract shall comply in all respects to performance and delivery requirements of the specifications and shall not be adversely affected by any date-related data Year 2000 issues. This warranty shall survive the expiration or termination of this Contract. In addition, the defense of *force majeure* shall not apply to the Contractor's failure to perform specification requirements as a result of any date-related data Year 2000 issues.
- (2) Additionally, notwithstanding any other warranty or disclaimer of warranty in this Contract, the Contractor warrants that each hardware, software, and firmware product delivered under this Contract shall be able to accurately process date/time data (including but not limited to calculation, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology utilized by the State in combination with the information technology being acquired under this Contract properly exchanges date-time data with it. If this Contract requires that the information technology products being acquired perform as a system, or that the information technology products being acquired perform as a system in combination with other State information technology, then this warranty shall apply to the acquired products as a system. The remedies available to the State for breach of this warranty shall include, but shall not be limited to, repair and replacement of the information technology products delivered under this Contract. In addition, the defense of *force majeure* shall not apply to the failure of the Contractor to perform any specification requirements as a result of any date-related data Year 2000 issues.

F. Compliance With Applicable Laws. The materials and services supplied under this Contract shall comply with all applicable Federal, state and local laws, and the Contractor shall maintain all applicable license and permit requirements.

G. Survival of Rights and Obligations after Contract Expiration or Termination.

- (1) Contractor's Representations and Warranties. All representations and warranties made by the Contractor under this Contract shall survive the expiration or termination hereof. In addition, the parties hereto acknowledge that pursuant to A.R.S. § 12-510, except as provided in A.R.S. § 12-529, the State is not subject to or barred by any limitations of actions prescribed in A.R.S., Title 12, Chapter 4.
- (2) Purchase Orders. The Contractor shall, in accordance with all terms and conditions of the Contract, fully perform and shall be obligated to comply with all purchase orders received by the Contractor prior to the expiration or termination hereof, unless otherwise directed in writing by the Procurement Officer, including, without limitation, all purchase orders received prior to but not fully performed and satisfied at the expiration or termination of this Contract.

8. State's Contractual Remedies.

- A. Right to Assurance. If the State in good faith has reason to believe that the Contractor does not intend to, or is unable to perform or continue performing under this Contract, the Procurement Officer may demand in writing that the Contractor give a written assurance of intent to perform. Failure by the Contractor to

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provide written assurance within the number of Days specified in the demand may, at the State's option, be the basis for terminating the Contract under the Uniform Terms and Conditions or other rights and remedies available by law or provided by the Contract.

B. Stop Work Order.

- (1) The State may, at any time, by written order to the Contractor, require the Contractor to stop all or any part, of the work called for by this Contract for period(s) of days indicated by the State after the order is delivered to the Contractor. The order shall be specifically identified as a stop work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.
- (2) If a stop work order issued under this clause is canceled or the period of the order or any extension expires, the Contractor shall resume work. The Procurement Officer shall make an equitable adjustment in the delivery schedule or Contract price, or both, and the Contract shall be amended in writing accordingly.

C. Non-exclusive Remedies. The rights and the remedies of the State under this Contract are not exclusive.

D. Nonconforming Tender. Materials or services supplied under this Contract shall fully comply with the Contract. The delivery of materials or services a portion of the materials or services that do not fully comply constitutes a breach of contract. On delivery of nonconforming materials or services, the State may terminate the Contract for default under applicable termination clauses in the Contract, exercise any of its rights and remedies under the Uniform Commercial Code, or pursue any other right or remedy available to it.

E. Right of Offset. The State shall be entitled to offset against any sums due the Contractor, any expenses or costs incurred by the State, or damages assessed by the State concerning the Contractor's non-conforming performance or failure to perform the Contract, including expenses, costs and damages described in the Uniform Terms and Conditions.

9. Contract Termination.

A. Cancellation for Conflict of Interest. Pursuant to A.R.S. § 38-511, the State may cancel this Contract within three (3) years after Contract execution without penalty or further obligation if any person significantly involved in initiating, negotiating, securing, drafting or creating the Contract on behalf of the State is or becomes at any time while the Contract or an extension of the Contract is in effect an employee of or a consultant to any other party to this Contract with respect to the subject matter of the Contract. The cancellation shall be effective when the Contractor receives written notice of the cancellation unless the notice specifies a later time. If the Contractor is a political subdivision of the State, it may also cancel this Contract as provided in A.R.S. § 38-511.

B. Gratuities. The State may, by written notice, terminate this Contract, in whole or in part, if the State determines that employment or a Gratuity was offered or made by the Contractor or a representative of the Contractor to any officer or employee of the State for the purpose of influencing the outcome of the procurement or securing the Contract, an amendment to the Contract, or favorable treatment concerning the Contract, including the making of any determination or decision about contract performance. The State, in addition to any other rights or remedies, shall be entitled to recover exemplary damages in the amount of three times the value of the Gratuity offered by the Contractor.

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- C. Suspension or Debarment. The State may, by written notice to the Contractor, immediately terminate this Contract if the State determines that the Contractor has been debarred, suspended or otherwise lawfully prohibited from participating in any public procurement activity, including but not limited to, being disapproved as a subcontractor of any public procurement unit or other governmental body. Submittal of an offer or execution of a contract shall attest that the Contractor is not currently suspended or debarred. If the Contractor becomes suspended or debarred, the Contractor shall immediately notify the State.
- D. Termination for Convenience. The State reserves the right to terminate the Contract, in whole or in part at any time, when in the best interests of the State without penalty or recourse. Upon receipt of the written notice, the Contractor shall immediately stop all work, as directed in the notice, notify all subcontractors of the effective date of the termination and minimize all further costs to the State. In the event of termination under this paragraph, all documents, data and reports prepared by the Contractor under the Contract shall become the property of and be delivered to the State upon demand. The Contractor shall be entitled to receive just and equitable compensation for work in progress, work completed and materials accepted before the effective date of the termination. The cost principles and procedures provided in A.A.C. R2-7-701 shall apply.
- E. Termination for Default.
- (1) In addition to the rights reserved in the Contract, the State may terminate the Contract in whole or in part due to the failure of the Contractor to comply with any term or condition of the Contract, to acquire and maintain all required insurance policies, bonds, licenses and permits, or to make satisfactory progress in performing the Contract. The Procurement Officer shall provide written notice of the termination and the reasons for it to the Contractor.
 - (2) Upon termination under this paragraph, all goods, materials, documents, data and reports prepared by the Contractor under the Contract shall become the property of and be delivered to the State on demand.
 - (3) The State may, upon termination of this Contract, procure, on terms and in the manner that it deems appropriate, materials or services to replace those under this Contract. The Contractor shall be liable to the State for any excess costs incurred by the State in procuring materials or services in substitution for those due from the Contractor.
- F. Continuation of Performance Through Termination. The Contractor shall continue to perform, in accordance with the requirements of the Contract, up to the date of termination, as directed in the termination notice.
10. **Contract Claims.** All contract claims or controversies under this Contract shall be resolved according to A.R.S. Title 41, Chapter 23, Article 9, and rules adopted thereunder.
11. **Arbitration.** The parties to this Contract agree to resolve all disputes arising out of or relating to this Contract through arbitration, after exhausting applicable administrative review, to the extent required by A.R.S. § 12-1518, except as may be required by other applicable statutes (Title 41).

ATTACHMENT 6.1

PRICES/DELIVERY SCHEDULE SOLICITATION NO. ED04-0080

Item	Description	Qty	Price
1	ADE certification application		
	Beta Release	1 Lot	165,000
	Production Release with documentation	1 Lot	35,000

Subtotal \$ 200,000

 %* Arizona Sales Tax, State and City* \$

Total Offer \$ 200,000

If payment is made within 10 calendar days after acceptance of goods and/or services, the above quoted price, excluding sales tax, shall be discounted by 1 %. (Refer to Uniform Instructions To Offerors for discount requirements.)

Notice: If the transaction privilege (sales) taxes are not described and itemized on the offer, the State will assume that the price(s) offered includes all applicable taxes.

END OF CONTRACT ED04-0080